



# The Politics of Criminal Law in Setting Adultery Offenses in Indonesia

Rahman<sup>1</sup>(✉), M. Hasbi Umar<sup>2</sup>, Usman<sup>3</sup>, and Erdianto<sup>4</sup>

<sup>1</sup> Ilmu Hukum Universitas Adiwangsa Jambi, Jambi, Indonesia

rahmanjambi43@gmail.com

<sup>2</sup> Universitas Islam Negeri Sulthan Thaha Saifuddin Jambi, Jambi, Indonesia

<sup>3</sup> Hukum Pidana Universitas Jambi, Jambi, Indonesia

<sup>4</sup> Hukum Pidana Universitas Riau, Riau, Indonesia

**Abstract.** The aims of this study: 1) To analyze the arrangements for adultery offenses in Indonesian criminal law 2) To analyze the arrangements for adultery offenses in the politics of Indonesian criminal law. The issues discussed: 1) How is the regulation of adultery offenses in Indonesian criminal law. 2) How is the regulation of adultery offenses in the politics of Indonesian criminal law. The method used is normative juridical and uses statutory approaches, historical approaches, conceptual approaches. The results of this study 1) There are three provisions for adultery offenses in Indonesia in the Criminal Code, namely: adultery committed by force, adultery committed by psychological coercion and adultery committed on a consensual basis. The act of adultery has been regulated in Articles 411, 412 and 413, the act is included in the absolute complaint offense. 2) The politics of criminal law in Indonesia regarding the crime of adultery in law reform in Indonesia, namely Articles 411, 412 and 413 of the 2023 Criminal Code which have several expansions regarding the meaning of adultery, namely: first, adultery in all forms, both *adulteri* (*muhson*), or fornication (*ghairu muhson*) as a crime. Second, in Articles 411, 412 and 413 of the Criminal Code the adultery offense is still categorized as an absolute complaint offense, but there are still deficiencies in the formulation of these articles, so it is necessary to reconstruct Articles 411, 412 and 413 of the Criminal Code in the National Criminal Code.

**Keywords:** Criminal Law · Politics · Setting Adultery Offenses

## 1 Introduction

The criminal law that is being enforced in Indonesia is currently experiencing a critical phase because the condition of society continues to experience development so that the criminal law which is a colonial legacy is no longer able to contain it. In the midst of the legal upheaval of the colonial heritage, the community has been underway in the process of reforming the national criminal law as an answer to the unrest over this issue. The Criminal Code as a product of Dutch law continues to experience renewal efforts. The substance of the current Criminal Code is individualistic and not in accordance with the values that live in Indonesian society. Various diseases in society continue to emerge due to weak legal legitimacy and only taking sides with personal aspects.

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Islamic law is still often perceived as unfavorable among jurists, bureaucrats and political elites, so that it has a major influence on public perception. Islamic criminal law, especially in Islamic countries or where the majority of the population is Muslim but inherits colonial law, is ultimately unfamiliar and receives little appreciation in the academic sphere. Destructive stigma has also “become mainstream in positioning Islamic criminal law as cruel, rigid, inhumane, barbarian and violating human rights” [1]. The dominant connotations are stoning (stoning to death), cutting off hands, binding, and qisas (punishment for crimes against life).

According to the principle of legality, Islamic criminal law is categorized as unwritten law. However, in fact Islamic criminal law can be recognized constitutionally as law that continues to apply. Islamic criminal law, which according to the principle of legality is categorized as unwritten law, can still be recognized constitutionally in Indonesia as law, and continues to apply according to Article II of the Transitional Rules. UUD 1945. However, these basic provisions have not been followed up with legal instruments to enter into legality principle instruments. As with the KHI above, the position of Islamic Criminal Law has not been certain to answer the theoretical question, which criminal law can be enforced.

According to Abdullah Abdul Gani “the absence of written Islamic Criminal Law in Indonesia is the cause of the non-fulfillment of Islamic Criminal Law legally in accordance with the question. That’s why Islamic Criminal Law really has to be prepared in writing like other positive laws, not directly basing it on sources of Islamic law, namely the Koran, Sunnah, and *ijtihad* on scholars (*fiqh* books).

The criminal law that applies in Indonesia until now is still a legacy of the Dutch East Indies government. Since the beginning of the 19th century, the Dutch East Indies imposed a codification of criminal law which was initially still pluralistic, namely the Criminal Code for Europeans and the Criminal Code for Indigenous people and those who were equated (inlanders). Starting in 1918 in Indonesia, a single Criminal Code was enacted for all groups in the Dutch East Indies (criminal law unification) until now.

Since Indonesia’s independence, the criminal code has been translated into Indonesian into the Criminal Code (KUHP). The Criminal Code was declared effective through the constitutional basis of Articles II and IV of the Transitional Rules of the 1945 Constitution with Law no. 1 of 1946. In Article III it is stated that the words *Nederlansch-Indie* or *Nederlandsch-Indisch* (e) (en) must be read as “Indonesie” or “Indonesche”, which then becomes Indonesia. In Article VI (1) it is stated that *Wetboek van Strafrecht voor Nederlansch-Indie* is changed to *Wetboek van Strafrecht*. Then in paragraph (2) the legal code is translated into the Criminal Code (KUHP). This is the basis so that Law no. 1 of 1946 is called the Criminal Code Law. This law applies officially to all regions of Indonesia with Law no. 73 in 1958.

The development of legal politics in Indonesia has undergone growth by taking into account the influence of societal and religious values. So it is time for Muslim scholars and intellectuals to also emphasize religious principles, so that adherents no longer violate their religious teachings by means of self-enforcement. “The enforcement of religious laws (rules) in a preventive manner is very helpful in consolidating the pattern of state law enforcement in a preventive-repressive manner. The goal is for people to understand and comply with the rules of state law and religious rules at the same time

[2]. Thus, Islamic sharia is not only preached, but also implemented through preventive law enforcement (not repressive) to fill the weaknesses of positive criminal law.

Integrating Islamic Criminal Law into the national criminal law, as seen in several articles in the Criminal Code, is a quite wise thought. However, if explicitly this cannot be done, at least the main principles can be embodied in our criminal law. For example, the crime of adultery and drinking alcohol does not necessarily have to be punished by stoning or forty lashes for the perpetrators. The most principle is how the two examples of forms of action are considered as criminal acts that are not in accordance with Islamic principles and morality. This, according to Masykuri Abdullah, is a process of a gradual strategy of Islamic legal legislation which is in line with the principles of fiqh: *Ma la yudraku kulluh la yutraku kulluh* (something which cannot be achieved entirely, cannot be completely abandoned). This step is not the most ideal, but it is enough to give hope for the gradual implementation of Islamic Criminal Law in Indonesia. An offer like this might also be able to satisfy some parties who often reject any attempt to enforce Islamic law in Indonesia.

Renewal of Islamic criminal law becomes important when the current criminal law of the Criminal Code is unable to answer the progress of an increasingly advanced era and increasingly demands fair treatment of all parties, fair treatment is inseparable from the existence of good law, this renewal is also important for the existence of Islamic values. Values that have been adhered to by the community can be codified into the form of legislation created by the Indonesian nation itself. Therefore, the reform of criminal law and legal development must be carried out comprehensively by the government for the sake of upholding legal justice in society. The concept of Indonesian criminal law in the future has an important role in the development of national character, an Indonesian nation that has the philosophy of Pancasila which has good basic values, ethics and culture of course. This is the background for the author to carry out a study entitled "Politics of Criminal Law in the Arrangement of Adultery Offenses in Indonesia".

### **Formulation of the Problem**

Given the background of the problems above, the formulation of the problem in this study includes: First, how is the regulation of adultery offenses in Indonesia in the Criminal Code? Second, how is the regulation of adultery offenses in the legal politics of forming the National Criminal Code?

### **Research Purposes**

In this research plan, the authors aim to obtain results, namely: First, to analyze the arrangements for adultery offenses in Indonesia in the Criminal Code. Second, to analyze the arrangements for adultery offenses in the legal politics of the formation of the National Criminal Code.

## **2 Research Methods**

The approaches used in this study are historical approaches, conceptual approaches, normative approaches and approaches. The historical approach is by studying the historiography of criminal law, especially in Indonesia. By studying the history of law, it will be known the causes and purposes of reforming Indonesian criminal law. The conceptual

approach is an approach used to obtain clarity and scientific justification based on legal concepts originating from legal principles. With this approach, various theories and legal principles related to Islamic criminal law will be examined so that the epistemological basis for criminal law reform in Indonesia can be identified. The statutory approach (normative approach), namely by examining the provisions contained in the Indonesian Criminal Law Act. With this approach, it will be known what new aspects are contained in Indonesian criminal law, so that an ideal concept of criminal law can be produced in legal politics in Indonesia, in particular.

### **3 Research Results and Discussion**

#### **Arrangements for Zina Offenses in Indonesia in the Criminal Code**

The formulation of Article 411 of the Criminal Code has expanded the substance of adultery offenses by not distinguishing between those who are married and those who are not married, nor does it differentiate between men and women in committing criminal acts. This means that anyone who has intercourse with another person, whether married or not, can be said to be an act of adultery.

So from the description above, it can be said that the formulation of Article 411 of the Criminal Code is in accordance with the outlook on life of the Indonesian people and has reflected the socio-cultural values of the Indonesian nation. Based on its nature, the formulation of adultery offenses in the Criminal Code still uses absolute complaint offenses. What is different is that the subject who has the right to complain in the Criminal Code is expanded, so that those who have the right to complain about adultery offenses are the husband, wife, parents or children who are harmed. By its nature as an absolute complaint against the backdrop of the individualistic-liberalistic culture of Western Europe, it is also very much at odds with the socio-cultural structure of Indonesian society which is familial, collectivistic and mono-dualistic. In Indonesian society, adultery is no longer a private matter, but a dangerous social and religious problem and disease. The bad impact of adultery does not only affect the perpetrators and their families, but also damages the moral order of society. Thus it is very unwise to place the offense of adultery as an absolute complaint offense.

Based on the sentencing, the Criminal Code places the offense of adultery as a light offense. The Criminal Code criminalizes adultery with a maximum imprisonment of one year or a category II fine, namely a maximum fine of Rp. 10,000,000.00 (ten million rupiah). Providing light criminal sanctions for crimes which in the eyes of the Indonesian people are very heinous crimes and are dangerous social diseases that can cause disharmony in the family, cause dirty diseases, and other disasters.

#### **Arrangements for Adultery Offenses in the Legal Politics of the Establishment of the National Criminal Code**

The act of adultery is an act that is prohibited in any religion, therefore, in order to create an ideal criminal concept of adultery in the future National Criminal Code, it is necessary to pay attention to the religious values that the community adheres to in the discussion (policy formulation) of the Criminal Code. The ideal criminal concept of adultery is the concept of prevention before the occurrence of the act of adultery, so that

it can prevent the act of adultery and the act of abortion (murder) that can result from the act of adultery [1].

Efforts to realize the formulation or concept of an ideal setting for adultery offenses in the Criminal Code are still not aligned in detail with Islamic law, where in the Criminal Code there is a distinction between Islamic law which gives the impression of privacy and public law which is national in nature. In the provision of adultery offenses in the Indonesian Criminal Code, complaint offenses apply, of course, if it is related to the values of Islamic criminal law that are adhered to in society, these provisions are still far from the order of life of a religious Indonesian society. Changes in the concept regarding the offense of complaint in the matter of adultery offenses must be seen from the perspective of Islamic criminal law, therefore it is time for the provisions of offenses against adultery offenses in the National Criminal Code to be made into ordinary offenses in the concept of the National Criminal Code regarding adultery offenses. The regulation of adultery in the Criminal Code is not fully ideal, namely because it has not included Islamic crimes regarding the arrangement of adultery offenses into the Criminal Code and in setting the issue of these offenses it can only be applied specifically to Muslims, while for non-Muslims it can be adapted to the arrangements for adultery offenses adopted from Islamic criminal law. The. Because in essence there is no single religion in this world that justifies or allows its adherents to commit adultery, all religions prohibit any act of adultery committed by their adherents.

The desire of many parties hopes that there will be excavation of the living law in order to replace the old criminal law for various reasons, including the old criminal law or Criminal Code which has become obsolete and is not in accordance with the ethics and norms of the Pancasila of the Republic of Indonesia. This discrepancy can be seen from several articles in the Criminal Code which do not pay attention to the values that live in society, existing normative values and cultural and religious values that exist in society.

The following are several articles in the Criminal Code that are not in accordance with the times and cultural customs of the Indonesian people:

a. Article 1 paragraph (1) of the Criminal Code.

Article 1 paragraph (1) of the Criminal Code contains the principle of legality, it is stated in the article that a person cannot be punished if the person's actions are not included in the laws and regulations. This paragraph narrows the role of judges in legislation other than judges as judges in a case that already has rules, judges must also explore legal values that exist in society. This is in accordance with Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it is clearly stated in the Article that "Judges and Constitutional Justices are obliged to explore, follow and understand legal values and a sense of justice that lives in society." The judge deciding a case before him must first use written law first, but if there is none the judge must find it in jurisprudence, doctrine, treaties, customs or unwritten law [3].

From the article and some of the things above, that Article 1 paragraph (1) of the Criminal Code should no longer be enforceable because it has to give space for judges to use their authority independently to decide a case fairly even though the case does not exist or there are no rules governing it. So Article 1 paragraph (1) of the Criminal Code

should no longer be used as a reference because of the legality principle that exists in it. With the existence of a judge's decision that decides cases in accordance with the law that lives in society, in accordance with Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. Then the judge's decision can become jurisprudence for other judges when examining, hearing and deciding on the same case.

b. Article 411 of the Criminal Code.

Article 411 of the Criminal Code is an article that regulates the act of adultery committed by a wife or husband, the article states that if there is an affair by a married woman or a married man, then the penalty is 1 year in prison with an absolute complaint offense.

From the threat of punishment in Article 411 above, it can be concluded that the criminal law concerning decency is not very important in the thinking of the colonial Criminal Code. This is contrary to the culture, ethics and norms that exist in Indonesian society which highly respects the noble ethical, moral and religious values that exist in society. Because in Indonesian society, according to customary law, the punishment for the perpetrators of infidelity is very severe. Furthermore, the colonial heritage Criminal Code does not regulate how to punish unmarried and adult perpetrators, both men and women, when committing adultery. This is one of the weaknesses of the old Criminal Code. Even though the act of adultery is committed in society by unmarried men and women, even though it does not violate the law, the act disturbs the balance of society, with the disturbance of the sense of justice and balance, customary law should apply in this context. Every adultery case in Indonesia and become a thought on how to change Indonesia's criminal law in a direction that is more concerned with balance in society.

The balance in people's lives will be disrupted because events that occur are contrary to the sense of justice and legal awareness of society according to time, place and circumstances [4]. Affirmation of the concept of adultery offenses in the National Criminal Code, which is extracted from the cultural values of society and guided by moral virtues, is absolutely necessary. So that there is a pattern that becomes the rule along with the threat of criminal sanctions [5].

Islamic criminal law is a living law, and will continue to live as long as there are religious people, it cannot be abolished by legislation. Because Islamic criminal law is most closely related to religious beliefs. The symposium with the theme *The Influence of Culture and Religion on Criminal Law* provided an indication that the world of Indonesian jurisprudence is in a new era, namely the tendency to leave a dogmatic-juridical view of law towards sociological law [6].

As the religion and belief of the people in Indonesia, Islamic criminal law is appointed and transformed into the soul of national law and is included in the 1945 Constitution. Islamic criminal law in the view of the nation and state can be found in the philosophy of Pancasila and Bhineka Tunggal Ika. According to Utrecht in Hilman Hadikusuma that the criminal law that applies in Indonesia is a written criminal law, but it is not the desire of the Indonesian people but the criminal law was imposed on the Indonesian people by the Dutch [7].

We currently live in a very open era. Even because of too open association in society, religious values began to be abandoned. Just look at it now, we can easily find various

disobedience around us. Even things that lead to adultery are plastered around us. Today's young people seem to be competing in this. There are so many girls who show their body beauty freely, relationships with the opposite sex that cross the line and many other things that make Zina seem to be something normal. Coupled with the weak faith and knowledge of religion that is owned, making Zina more rampant.

The punishment that must be carried out at the present time is a crime that prioritizes humanity and improvements to the convict, these improvements are needed because the purpose of the actual sanction is to improve the convict so that he can organize his life back towards a better life, from this goal, justice must also be considered for victims and justice for convicts and justice in society. The aspect of justice in the enforcement and application of criminal law is very important because it is everyone's dream to get it. In the desire to get this, any law that can provide justice, then that law will be respected and implemented [8].

The importance of punishment and good sanctions cannot be separated from the government's role in forming laws that protect the whole community regardless of majority or minority. In addition to improving the law, improvement from the law enforcement side is no less important than improving the law. Because no matter how good and ideal a law is, if its implementation is not in accordance with its objectives, then the law will be in vain.

Apart from all that, the implementation of sanctions in any crime must be able to create a sense of justice for everyone who is litigation in any case, because justice is the main goal of a law. Customary criminal law that already exists in the Indonesian nation also has rules relating to crime. These rules will be useful if applied in daily life through existing rules in legislation that has been passed by the state, future criminal legislation must improve the sanction system which so far has paid little attention to the system of improvement for criminal offenders, criminal offenders should benefit from improvement from the imposition of sanctions on convicts, because sanctions are actually a means of improvement.

Apart from the pros and cons regarding formalism and substantialism in the matter of applying Islamic criminal law in the Indonesian context, it is a necessity that Indonesian Muslims are really demanded for wisdom to be able to consider proportionally various other aspects regarding positive values (*maslahat*.) or negative values (*mafsada*) which can be predicted as a consequence of each opinion. The aim is that the form of implementation of Islamic criminal law that will be chosen can truly reflect and at the same time be in the corridor of creating benefits for human life, especially the Indonesian people. This is because the essence of the purpose of Islamic law is prescribed, including Islamic criminal law, to create benefit and prevent damage to human life.

In addition, another thing that Muslims should not ignore is that the New Criminal Code, which is expected to become an accommodative vehicle for the enactment of the aspired Islamic criminal law, will later become a national legal product that is public in nature. So that in this way its implementation will reach all groups of the Indonesian population, not only towards the Muslim community. Based on these considerations, the idea that requires the application of formalistic Islamic criminal law, of course, must be rethought carefully [9].

## 4 Conclusion

Based on the description of the discussion of the issues raised in this research, there are several main points that can be drawn as a conclusion, namely: First, the regulation of adultery offenses in Indonesia in the Criminal Code Number 1 of 1946 and the National Criminal Code Number 1 of 2023 there are three things, namely; adultery committed by force, adultery committed by psychological coercion and adultery committed on consensual basis. The act of adultery has been regulated in Articles 411, 412 and 413, the act is included in the absolute complaint offense. Second, in the politics of criminal law, the sanctions for adultery offenses between married and unmarried persons are different. In Indonesia, what is regulated in Article 284 of the Criminal Code only prohibits adultery for everyone who is both or one of them is bound by marriage. In the National Criminal Code Articles 411, 412 and 413 the prohibition of adultery applies to everyone, in this case it is aligned with the values of Islamic criminal law, but in imposing sanctions it is not aligned because there is no difference between those who are married and those who are not married because perpetrators who are married have more disgraceful weight and a wider range of victims compared to those who are not married. Indonesian criminal law is not fully aligned with the values of Islamic criminal law because the internalization of these values in terms of sanctions and consequences of actions has not been absorbed and used as an element of aggravation and a harmonious formulation of the criminal act of adultery in legal reform in Indonesia, namely by looking at the in terms of the motive for the act of adultery itself, the position of the perpetrator, the marital status of the perpetrator and the consequences of adultery as an element of criminal aggravation, in Articles 411, 412 and 413 of the National Criminal Code there have been several extensions regarding the meaning of adultery, namely: first, adultery in all forms, whether adultari (already married), or fornication (not yet married) as a crime. Then, in Articles 411, 412 and 413 of the Criminal Code, the adultery offense is still categorized as an absolute complaint offense. In the National Criminal Code, the formulation of the absolute offense of complaint is expanded, so that those who have the right to complain about the offense of adultery are the husband, wife, parents or children who are harmed. Against the backdrop of the individualistic-liberalistic culture of West Europe, it is also very much at odds with the socio-cultural structure of Indonesian society which is familial, collectivistic and mono-dualistic. In Indonesian society, adultery is no longer a private matter, but a dangerous social and religious problem and disease. The bad impact of adultery does not only affect the perpetrators and their families, but also damages the moral order of society. Thus it is very unwise to place the offense of adultery as an absolute complaint offense. Thus Articles 411, 412 and 413 need to include elements of aggravating criminal threats for adulterers who are married and who are not married. They must differentiate and reconstruct Articles 411, 412 and 413.

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